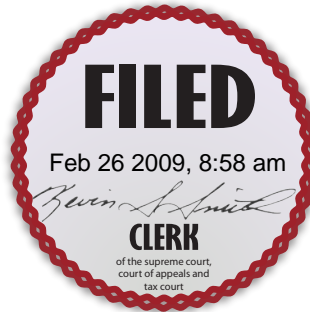


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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EBONY BURT,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 84A01-0808-CR-400

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APPEAL FROM THE VIGO SUPERIOR COURT  
The Honorable David R. Bolk, Judge  
Cause No. 84D03-0704-MR-1373

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**February 26, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Following a jury trial, Appellant-Defendant Ebony Burt challenges his conviction for Murder, a felony,<sup>1</sup> for which he received a sentence of sixty years in the Department of Correction. Upon appeal, Burt challenges the sufficiency of the evidence to support his conviction by claiming that witness accounts identifying him to be the perpetrator are incredibly dubious. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On the evening of April 12, 2007, Burt arrived at an abandoned house at 412 North 14th Street in Terre Haute to buy marijuana from Marc McLawyer and Michael Wyatt. Burt's friend, Andre Miller, had originally organized the purchase, but he sent Burt on his behalf. Burt was wearing blue jeans and a gray sweatshirt. Wyatt provided Burt with a small sample of marijuana, prompting Burt to display and count the money he had brought. Upon seeing Burt's money, Wyatt left to retrieve the marijuana intended for Burt. When Wyatt returned and offered Burt the marijuana, Burt became hostile and aggressive, claiming that it was not the same marijuana contained in the sample. According to McLawyer, Burt pulled out a black revolver with a short barrel and "put it on" Wyatt, which caused McLawyer to put his hands up and run for the door. Tr. p. 68. McLawyer heard a gunshot as he ran to the door and another gunshot as he crossed the street.

Witnesses Shakiylah Kelley and Shantella Blackmon, who were in the area at the time, heard gunshots and saw two individuals run out of the house. The first individual, who appeared after the first gunshot, ran out of the house with his hands in the air. The

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<sup>1</sup> Ind. Code § 35-42-1-1(2) (2006).

second individual, who appeared after the second gunshot, was wearing a “dark gray hoodie,” and he appeared to be concealing something underneath his shirt. Tr. p. 132-33. Shortly thereafter, Kelley and Blackmon heard someone calling for help. Investigating officers who later arrived at the scene found Wyatt lying dead inside the house due to a contact gunshot wound to his back and what was subsequently determined to be significant internal bleeding.

On April 25, 2007, Terre Haute Police Officer Troy Davis interviewed Burt, who admitted to being at the house on the day in question for the purpose of buying drugs, that he was wearing a gray sweatshirt at the time, and that two other persons were present. At some point Officer Davis told Burt that his clothing and an earring he was wearing would be needed to be tested for trace evidence. Officer Davis temporarily placed Burt in a holding cell, but when he removed Burt from the cell, he noticed that Burt’s earring was gone. Burt claimed he had never worn an earring, and the earring was never recovered. Burt’s jeans were tested but yielded no trace evidence.

According to witness Shawn Harris, who was related to Burt’s friend, Miller, and who shared a cell block with Burt, Burt told him that Miller had told Burt to meet some individuals at the abandoned house on North 14th Street for the purpose of robbing them of marijuana. Burt admitted to Harris that he had pulled out a gun, that McLawyer had run out of the house, and that he had tried to grab the marijuana from the other individual there and had shot at him twice.

According to witness William Roberts, who was also in jail with Burt and related to Miller, Burt similarly stated that he had shot and killed a man while robbing him of

marijuana on North 14th Street. Burt apparently asked Roberts to contact someone who knew McLawyer to keep him from coming to court.

According to witness Jwaun Moreland, who is Miller's brother, Burt had asked him for .38 caliber bullets the day of the incident, which Moreland did not have. Moreland saw Burt later that evening, and Burt admitted having attempted to rob someone and having shot him in his back/neck area. At the time, Burt was carrying a black .38 special short barrel gun.

Vigo County Coroner Dr. Roland Kohr determined from Wyatt's gunshot wound that his death was likely caused by a revolver. Indiana State Police firearms examiner Rafael Perez concluded that bullets later found at the scene and in Wyatt's body were consistent with having been shot by a .38 special revolver.

On April 23, 2007, the State charged Burt with two counts of murder (Counts 1 and 2)<sup>2</sup> and Class A felony robbery resulting in serious bodily injury. During a June 23-25, 2008 jury trial, Burt was found guilty as charged. The trial court determined that Count 3 merged with Count 2 and entered judgment of conviction on Counts 1 and 2. Following a sentencing hearing, the trial court issued an August 11, 2008 sentencing order which vacated its judgment of conviction in Count 1 and sentenced Burt to sixty years in the Department of Correction on Count 2. This appeal follows.

## **DISCUSSION AND DECISION**

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<sup>2</sup> Count 2, charged under Indiana Code section 35-42-1-1(2), was based upon a theory of felony murder.

Burt challenges the sufficiency of the evidence to support his murder conviction by claiming that it consisted of “incredibly dubious testimony from felon witnesses.” Appellant’s Br. p. 12. Our standard of review for sufficiency-of-the-evidence claims is well-settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.* It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

A reviewing court will impinge upon the fact-finder’s credibility judgments only when confronted with testimony of inherent improbability, or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. *Kien*, 782 N.E.2d at 407. A conviction will be overturned on this basis only where a victim’s testimony is so incredibly dubious or inherently improbable that it runs counter to human experience, and no reasonable person could believe it. *Id.* This exception applies only to cases where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion, and there is a complete lack of circumstantial evidence of guilt. *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000).

Under Count 2, Burt was charged with killing Wyatt while committing or attempting to commit robbery. *See* Ind. Code § 35-42-1-1(2). Four witnesses implicated Burt as the perpetrator of the robbery and killing. One of these witnesses, McLawyer, was present at the scene. Three other witnesses, Harris, Roberts, and Moreland, were privy to Burt's own admissions to the robbery and shooting. With respect to the possible credibility problems of these witnesses, defense counsel thoroughly cross-examined each witness, pointing out their criminal histories and potential ulterior motives, and the jury was within its discretion to find the witnesses' testimony credible.

Circumstantial evidence also implicates Burt as the perpetrator. Burt admitted that he was wearing a gray sweatshirt and present at the scene of the crime, and witnesses Kelley and Blackmon saw a person wearing a gray "hoodie" flee the house, hiding something in his shirt, soon after the last shot was fired. Burt asked for .38 caliber bullets the day of the crime, and the evening of the crime he was seen carrying a .38 special, capable of firing the bullets found in Wyatt's body and at the scene of the crime. Wyatt's effort to conceal potential evidence further implicates him. When told that his earring was needed for trace evidence testing, the earring mysteriously disappeared and was never recovered.

Given the testimony of multiple witnesses and the circumstantial evidence implicating Burt, Burt's incredible dubiousity challenge is unavailing, and we will not impinge upon the jury's credibility judgment. We conclude there was sufficient evidence to support Burt's conviction for Wyatt's murder.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and MAY, J., concur.